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Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Room 1870
Washington, DC 20230

Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment

Dear Ms. Kuhbach:

These comments are filed on behalf of the Southern Tier Cement Committee (the "STCC") in response to the Department's *Federal Register* notice soliciting comments on the applicability of the U.S. countervailing duty ("CVD") law to imports from the People's Republic of China ("China").

The STCC is an ad hoc coalition of 23 U.S. cement companies that operate 63 cement plants located in 29 states. It has participated on behalf of the U.S. cement industry in numerous administrative and sunset reviews conducted under the antidumping order on gray portland cement from Mexico. Because of this experience, the members of the STCC have an interest in maintaining strong U.S. trade laws to ensure that imports are fairly traded. The STCC urges the Department to determine that the CVD law, consistent with the WTO Subsidies and Countervailing Measures Agreement ("SCM Agreement"), requires it to conduct CVD

investigations of imports from China and other NMEs to the same extent as imports from market economy countries.

A. *Georgetown Steel* Does Not Constrain The Department From Applying CVD Law To Imports From China

The STCC understands that other parties, such as NewPage Corporation ("NewPage") and the Committee to Support U.S. Trade Laws ("CSUSTL"), are submitting comments explaining why the Federal Circuit's decision in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), does not prohibit the Department from changing its practice to apply the CVD law to imports from China. The STCC agrees with and supports the arguments made by NewPage and CSUSTL. *Georgetown Steel* affirmed the Department's discretion to determine whether or not to apply a now-repealed CVD statute to imports from an NME country. While the STCC believes, as explained below, that the current statute requires the Department to apply the CVD law to China and other NMEs, at the very minimum the Department has the discretion to change its practice and to do so in pending and future cases.

B. The CVD Statute Must Be Applied To Imports From All Countries, Including China

In interpreting a statute, the starting point is the statutory language itself. Where the language is clear and unambiguous, the statute should be applied in accordance with its terms.[1] The statute requires the Department to impose a countervailing duty if, among other things, it "determines that the government of a country or any public entity within the territory of a

[1] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See also Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States . . . ." 19 U.S.C. § 1671. The statute further broadly defines a "country" as "a foreign country, a political subdivision, dependent territory, or possession of a foreign country . . . ." 19 U.S.C. § 1677(3). Nothing in this provision or elsewhere in the statute qualifies or limits the broad language applying CVD remedies to every "country," meaning that it applies equally to imports from all nations, including China.[2] Thus, the Department is required to impose CVDs on imports from China on the same basis as for other countries.

In addition, the statute defines a countervailable subsidy without limiting its application to any particular set of countries or any type of foreign economy. In language that tracks Article 1 of the SCM Agreement, the statute generally defines a "countervailable subsidy" as one that is specific and confers a benefit by means of a financial contribution, any form of income or price support within the meaning of Article XVI of the GATT 1994, or a payment to a funding mechanism to provide a financial contribution. 19 U.S.C. § 1677(5)(A) & (B). This definition is not confined to activities that can be engaged in only by the government of a market economy.

In fact, nowhere does the statute mention NME countries generally or China in particular. This omission is telling. Had Congress intended to provide an exception for NME countries from the Department's broad statutory authority to conduct CVD investigations and the broad

[2] The Department itself has acknowledged that "there is no explicit statutory bar against applying the CVD law to NME countries" and that "it is inaccurate to state that the Department does not currently accept CVD petitions against China." GAO Report 05-474, *U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties* (June 2005) ("GAO Report"), Appendix III (DOC Response to GAO Report on China and CVD).

definition of a countervailable subsidy, it surely would have done so explicitly in the statute. Thus, the Department is required by the statute to treat NME imports the same as imports from all other countries.

C. China Has Committed To Comply With WTO Subsidies Disciplines And Has Admitted That It Subsidizes Its Industries

The U.S. CVD statute, as amended by the Uruguay Round Agreements Act, is intended to implement U.S. obligations under the WTO SCM Agreement, and its language closely tracks that of the SCM Agreement. The Agreement permits WTO Members to impose CVDs on subsidized imports and nowhere exempts imports from an NME country (or even addresses NME country imports). In particular, the language defining a subsidy in Article 1 of the Agreement makes no distinction between market economies and NMEs and plainly applies to both types of economies.

The applicability of the SCM Agreement to China is made abundantly clear by Article 15 of China's WTO Accession Protocol, in which China agreed to subject itself to subsidies disciplines. Among other things, Article 15(b) of the Accession Protocol permits the application of third-country information in CVD determinations. Article 15(b) is not premised on the concept that China has achieved market economy status; it applies regardless of the nature of China's economy. Under Article 10.2 of the Protocol, China further agreed that subsidies provided to state-owned enterprises will be viewed as specific (and, thus, actionable and countervailable) if state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.

Under Article 10.3 of the Protocol, China agreed, among other things, to eliminate all export subsidies and subsidies that are conditioned upon the use of either domestic goods or

export performance. China also agreed to fully notify the WTO of all subsidies as required by Article 25 of the SCM Agreement. In April 2006, the Government of China notified 78 subsidies to the WTO. These subsidies include various types of tax preferences, exemptions on duties payable on imported raw materials and equipment, and various other benefits. Eight of these subsidies were specifically listed in the CVD petition filed by NewPage Corporation on October 31, 2006, and the Department has included them in its investigation. Thus, the Chinese Government has admitted providing subsidies to its industries, and it is not unreasonable to suspect that significant subsidies have been provided to Chinese producers of gray portland cement, who have recently become the leading exporters of cement to the United States.

There is no question that China is covered by the SCM Agreement's disciplines and remedies. Thus, it would makes no sense for the Department to conclude that the U.S. CVD law, which was drafted to conform to the Agreement, does not apply CVD remedies to imports from China.

D. Conclusion

The Department's practice regarding NME countries has not been reexamined in light of the WTO SCM Agreement and the current statutory language that requires applying CVD remedies on the same basis for imports from China as for imports from other countries. Clearly, the Department now has a statutory mandate for investigating illegally subsidized goods imported from China. The Department's existing practice is based on its conclusions with respect to the difficulty of determining subsidy benchmarks in the totalitarian economic regimes that prevailed in Eastern Europe 20 years ago. Those out-dated conclusions must be reconsidered. They do not reflect current reality with respect to China, which has been in an economic transition for many years and relies far less on central planning than before.

In addition, the Chinese Government in recent years has aggressively subsidized a wide variety of Chinese manufacturers to promote the development of favored industries. The unfair advantages these subsidies provide Chinese exporters are a major catalyst for China's growing trade surplus with the United States. Subsidized imports from China distort trade and economically harm U.S. industries as much as, or more than, subsidized market economy imports. Under the CVD statute, they must also be remedied in the same manner as other imports.

Thank you for considering these comments of the STCC

Sincerely,

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